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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-227

CONTINENTAL BAKING COMPANY,
Petitioner,

vs.

THE OLD HOMESTEAD BREAD COMPANY and INTERSTATE BRANDS CORPORATION
Respondents.

BRIEF OF RESPONDENT INTERSTATE BRANDS CORPORATION IN OPPOSITION

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STATEMENT OF THE CASE

Continental Baking Company has asked this Court to issue a writ because of the supposed importance of this case in permitting food companies to use private labels and pass cost savings to customers. This case in no way represents a typical "private label" market arrangement or problem. In 1962 the Continental Baking Company advised its stockholders that it had constructed the largest bread plant in the Rocky Mountains. (X p. 502) The plant was indeed enormous. It operated at 50% of capacity and

Continental's officers knew it could not break even until the tonnage increased to 75% of capacity.

"Regional Vice President Ward:

'Q. Well, do you know whether the plant—meaning the Denver plant—can operate at a profit when it is, let's say, running at fifty percent of capacity?

A. No it would not produce a profit at fiifty percent capacity.

Q. * * * What percent of capacity, in your opinion, would it have to operate at in order to show any profit at all?

A. I would say seventy-five to eighty percent.'" (R. 2078)

From 1963-1967 Continental Baking Company, the world's largest company of its kind, filed its enormous new Denver plant with tonnage obtained from its competitors and caused extended and permanent injury to competition.

The notion that this unprecedented three-year increase in production (33,000,000 pounds to 522,000,000 pounds) was a typical "private label" bread program is palpably absurd. (X. 825)

The regional executive officer of Continental—a Mr. Ward—who supervised "private label" programs in 14 states, testified that Continental had no pricing plans with the invidious and destructive terms used in Denver.

"Q. Do you have any contracts in your territory which price a private-label product to be a certain differential from the advertised-label product?

A. No.

Q. Do you have any written contracts which require that the private label products will be in the first position and your advertised label products and Hostess cakes will be in second position?

A. No, we do not." (R. 946.)

Yet, these unusual "terms" were the heart of the "Tender Crust" contract that filled Continental's coffers at the expense of industry competition (X. 849-52, 886, 917-19).

The wholesale bread industry is built on pennies. Key pricing and purchase decisions reflect the fungible nature of the product. All bread is the same. It is of like grade and quality (R. 776). The largest independent buyer in the market (Mr. Johnson of A.G.) testified that the products sold under a variety of labels were of identical quality.

> "Q. And these [products—Tender Crust, Wonder, Town Talk, Butternut, Rainbo] are like kind and quality, is that correct?
> A. That's correct." (R. 608)

In late 1967, on the eve of Old Homestead's receivership, Continental had tied up by discriminatory and unlawful pricing virtually every independent account. The pricing directly effected primary live competition—which was injured or destroyed.

The writ unfairly and inaccurately suggests that the only issue determined by the jury was the discrimination beween private label and regular brand of merchandise and compounds that error by suggesting that the same product, meaning private label, was available to all customers at the same price. The facts on which the jury based its determination are quite different. Continental Baking Company had at least five labels on the market. Their regular label, Wonder Bread, and, in addition, Tender Crust (A.G. Stores), Oak Farms (7-11 Stores), Red Owl (Red Owl Stores) and Gem (a label for another group of supermarkets).

The price to Associated Grocers and the discriminations involved were as follows:

	Regular Price	A.G. Price	% of Discrimination
1964 (August-Sept.)	18.5	15	18.8
1966 (August-Sept.)	21	18.4	12.4
1967 (August-Sept.)	16	13.05	18.9

Continental discriminated not only between the Tender Crust or Associated Grocer price compared to the regular Wonder Bread price but also discriminated between private labels. On the eve of Old Homestead's receivership and for an "indefinite" period, Continental instituted the following price changes:

RECOMMENDATION FOR PRICE CHANGE

Continental — Denver, Colorado — 11/15/67

Continental	From	To	Competitor	From	To
1# Wonder	21	16	Rainbo 1#	21	16
1# Tender Crust	20	15	None		
1# Oak Farm	20	15	None		
1# Red Owl	20	15	None		
1# Gem	20	15	None		

Effective Date 11/16/67 to indefinite

The *list price* of Tender Crust label bread was not actually used; a discount of up to 11% applied and a 2% central billing further reduced the payment by typical A.G. stores. (X. 885-88).

In the fall of 1967 and for an indefinite period, the regular label would be priced at 16¢ and the Tender Crust label for Associated Grocers would get as low as 13.05¢ because of two discounts, one of 2% and another of 11%, applied to the Tender Crust list price of 15¢.

Wonder Bread — list price regular label		16 ¢
Tender Crust — list price		15 ¢
Less discounts of		
2% and 11%	1.95¢	13.05¢
Price difference		2.95¢
Percentage discrimination ..		18%

Continental sold other labels at discriminatory prices: Red Owl, Gem and Oak Farms private labels were priced at 15¢ per unit when the Tender Crust label was selling for 13.05¢ (X. 886, 915; *supra* at pp. 8-9). Continental did not present even the pretext of a defense to that discrimination. The author of the cost study, a Mr. Swan, testified on cross-examination that the cost study did not even purport to justify any differences between Tender Crust customers who purchased under different discounts (R. 1648-49).

Continental therefore had four discriminations:

First, between regular customers and Tender Crust.

Second, between different Tender Crust purchasers, some buying at one discount, some buying at another discount.

Third, discriminations between Tender Crust private label customers and other private label customers (R. 912).

Finally, Continental was discriminating between private label customers—other than Tender Crust—and regular customers. This would include the favored Red Owl Stores, Oak Farm Stores, Fleming accounts and the Gem Stores, each of which during the period involved in this case received a private label price which was substantially lower than regular label. (R. 1960).

The private label Tender Crust program used by Continental thus discriminated among buyers of private label products as well as the regular branded merchandise. The plan was unique and not typical. It removed the independent grocer from general competition. It was maintained by a unique term which required Continental to drop its price below *any competitive price* (our point 623) and guaranteed to Continental the entire group of AG independent stores. It further required Continental to provide weekly specials at reduced prices and forced each store to use the regular Wonder Bread product as a secondary label (R. 628, 632, 850, 913-14; X. 850, 885). The plan grew from its initial 70 members purchasing $10,000 a week to 250 independent stores purchasing $40,000 a week (R. 691, X. 833-42). The suggestion that this "private label" program is a typical industry sales program is simply erroneous.

REASONS FOR DENYING WRIT

I. "Private label" pricing that discriminates between brands on products of "like grade" and quality is unlawful.

The Supreme Court in the evaporated milk case directly ruled on this issue:

> "The Commission's construction of the statute also appears to us to further the purpose and policy of the Robinson-Patman Act. Subject to specified exceptions and defenses, §2(a) proscribes unequal treatment of different customers in comparable transactions, but only if there is the requisite effect upon competition, actual or potential. But if the transactions are deemed to involve goods of disparate grade or quality, the section has no application at all and the Commission never reaches either the issue of discrimination or that of anticompetitive impact. We doubt that Congress intended to foreclose these inquiries in situa-

tions where a single seller markets the identical product under several different brands, whether his own, his customers' or both. Such transactions are too laden with potential discrimination and adverse competitive effect to be excluded from the reach of §2(a) by permitting a difference in grade to be established by the label alone or by the label and its consumer appeal." *FTC* v. *Borden Co.*, 383 U.S. 643, 644.

II. Causation: The jury determined that Continental's pricing caused damage to the industry, removed a competitor and tended to monopolize the market.

In this petition, Continental offers a unique legal justification for this predatory conduct. The issue is variously phrased: otherwise unlawful discriminations cannot be "causily" connected to the private label sales or, citing the Borden case in the Fifth Circuit or the Beatrice-Kroger FTC case, it is suggested that there is an "absence of any connection" between the market, damage and private label discriminations. Finally, it is suggested that the whole program was legal because it was "available."

No matter how it is said, Continental seriously suggests that this Court publish and endorse a ruling which excuses the outright discrimination of an independent competitor and a substantial general effect on competition caused by labeled discriminatory and below cost pricing on the theory that a "private label" should simply be treated differently. The Court should not accept that argument for the following reasons:

The jury decided all of these issues contrary to Continental's position. The jury found a violation of the Sherman Act as well as the Robinson-Patman Act. The jury had ample evidence to support the position that Con-

tinental's pricing was predatory and injurious to competition. Further, as discussed *supra*, they maintained for months the low cost pricing which made it impossible for competition to remain in the market. In this connection, the jury was repeatedly instructed that the Robinson-Patman Act declares unlawful price discriminations if the requisite competitive effects are shown (R. 2633). This admonition was repeated:

> "It must also appear that there was an injury to competition and that there was a tendency to create a monopoly as a result of the discriminatory sales or practices." (R. 2634)

The evidence established such competitive effects:

First, the private label plan—as discussed *supra*—was not typical of such pricing; it instigated price wars because if any competitor met the Associated Grocer Tender Crust price, the terms of that agreement required Continental to further reduce the price to always be below a competitor. Continental's plant manager testified as follows:

> "Q. So, when a wholesale baker competitor of yours would lower his advertised label down to near the private label price, you would, in turn, further lower the price on private label, is that right?
>
> A. This is generally correct.
>
> Q. And it is that competitive play that caused the price to get down, at one time, at least, to fifteen cents?
>
> A. That's correct." (R. 2083)

Rainbo's sales manager put it this way:

> "Q. And what is the effect of [Tender Crust's] sliding scale discount upon the other wholesale bakers serving the market area?
>
> A. Well, in short, the more that a grocer can sell of his program, *the larger his discount*, so it has a

direct bearing on the space allocation for your outside bakers. . ." [Emphasis added] (R. 2228)

Second, Continental, excluding companies such as Safeway and Millers who produce their own bread, increased its market share from roughly 32% to roughly 50% and eliminated a major competitor (Old Homestead).

Third, the jury had the right to find based on the evidence that Continental's price was simply below cost. Throughout extended periods, Continental sold private label bread at 15¢ to 16¢. Mr. Swan, who was the author of a rejected cost defense, testified as follows:

"Q. Now, if your thesis is correct, sir, if you sold [Wonder Bread] at anything below 18.86 cents, you would be selling below cost, is this correct?

A. That's correct.

• • •

Q. And it would necessarily follow that if you sold the Tender Crust product below 16.59 cents you would be selling that below cost, is this correct?

A. I would say based on this, yes." (R. 1646).

Since the Tender Crust bread was selling at 13.05¢ and Wonder Bread at 16¢, the jury logically concluded that Continental was repeatedly selling bread products below cost.

Fourth, Continental constructed a plant which was so enormous that the existing volume of business automatically put the plant in the red because it could not operate profitably at 50% of its capacity. It was only after Continental acquired all of the independent business in the market that the company operated at 75% to 80% of capacity, which was directly responsible for "putting the plant in the black" (R. 2078, 2080).

Sixth: The Tender Crust program was thus far more than a selective temporary price adjustment typical of the give and take between competitors. It was rather a gross elimination and destruction of competition.

The plan removed the independent grocers from general competition. The plan resulted in discriminations varying from 12% to 20% off the list price to guarantee to Continental the business of the entire group of A. G. Stores. The plan was maintained by a unique term which *required* Continental to drop its price below *any* competitive price (R. 623). It was designed to beat—not meet—competition and insulated the acquired accounts from fair and normal competition. The plan required Continental to provide weekly specials at reduced prices to support permanent weekly Wonder Bread products. The plan forced each store to use *Wonder* Bread as a second label (R. 628, 632, 850, 913-14; X. 850, 885).

The plan—finally—grew from its initial 70 members ($10,000 per week) to over 200 independent stores ($40,000 per week) (R. 691; X. 833-42). The independent stores who received these benefits from Continental were generally loyal to the program throughout (X. 648).

These pricing practices substantially injured competition. At the start of the program 4 wholesale bakers competed in the market—Continental; Rainbo; Interstate; and Old Homestead. The weaker—local—operator is now in receivership. The testimony on causation is explicit. Without a fair share of the available independent business, it is impossible to operate at a profit [plant manager Starr, R. 1957-58]—Old Homestead could do nothing to compete with a program that required Continental to repeatedly drop the price structure when any competi-

tor sought to hold on by "meeting" Continental (R. 1265-66).

III. Petitioners reliance on the Borden or Beatrice private label litigation is misplaced: both of those proceedings involved pricing which was not predatory.

As discussed fully *supra,* this case does not involve the success of the typical private label program. Continental suggests that private label was granting some form of immunity in *FTC* v. *Beatrice Foods Co. and Kroger Co.* The Commission said no such thing but carefully observed that primary line injury could either be based on "proof of predatory intent" or a market analysis sufficient to show "a reasonable probability of injury to competition."

> "• • • a finding of primary line injury might be based either on proof of predatory intent or on a market analysis, sufficient under the circumstances of the case to raise a reasonable probability of injury to competition. *National Dairy Products Corp.* v. *FTC,* 412 F.2d 605, 612-13 (7th Cir. 1969). In the present case there is neither a showing of predatory intent nor a sufficient market analysis to support a finding of competitive injury." (R. 2835).

The Commission simply concluded "nothing of this sort [predatory activities] appears in the present case." (R. 2835). Moreover, the evidence in that case supported a finding that Beatrice actually suffered by losing a substantial amount of business (R. 2837).

If Continental's argument were accepted, the Federal Trade Commission would have disposed of this injury point by simply noting that differences between private label and regular label cannot cause injury to competition.

The Commission did no such thing and the lesson to be learned from *Beatrice-Kroger* is that discriminations involving private label may well serve as the basis of primary line injury if predatory intent or injury to competition is shown. This record amply demonstrates sales below cost and the increase in Continental's production (a 50% growth) directly resulting from unlawful pricing. The record in this case shows Continental's actual destruction of one of four viable competitors. It shows protracted damage to competition covering many years of repeated deep price cuts, precisely those facts which the Commission observed are material to this question. The fact that Beatrice in a private label contract did not injure competition or use predatory below cost pricing is hardly a defense to Continental. The mistake running through Continental's argument is based on an assumption that these cases were decided because private label has some basic immunity under the law, but that is not so. The "immunity", if any, given to Beatrice was based on the fact that its private label argument, unlike Continental's did not involve repeated price cuts, below cost pricing and disastrous damage to the industry.

The Federal Trade Commission case involving Borden's private label milk went to the Supreme Court and was remanded to the Court of Appeals. The Supreme Court could well have simply stated that there was no violation of law because private label milk was not causily connected to other milk products. This Court did no such thing, however, and remanded the case with specific directions to determine the factual issues.

A comparison of the evidence reviewed by the Fifth Circuit and the evidence in this case viewed most favorably

—to support the jury verdict—shows a dramatic contrast:

Borden did not use "below cost or unrealistically low prices" on private label (381 F. 2d at 177); Continental did—all prices were below cost for extended periods.

Borden did not include "any device similar to the conventional volume discount" (381 F.2d at 177); Continental used such a price—and throughout the period provided indirect discriminations in the form of permanent weekly specials.

Borden was not "in any sense guilty of predatory behavior" (381 F. 2d at 177); Continental was. The very contract used by Continental, unique to the Denver market, required below cost pricing for the express purpose of filing up a plant built 50% over Continental's existing capacity.

Borden's "share of the market increased only" from 9.9% to 10.7% (381 F. 2d at 179); Continental's growth was much more dramatic, reflecting a 50% increase in total tonnage, at least a 9% increase in market share and, excluding Safeway and others who baked their own bread, Continental's share of the available market could well have increased to almost 50%.

In the *Borden* case, there was no showing that the creased their market position; in Denver one of four competitors was destroyed and both Interstate and Rainbo sustained substantial drops in production.

In the *Borden* case, there was no showing that the lower private label price caused any trade diversion or effect on competition; under Continental's plan, the Tender Crust business alone grew from $10,000 a week to $45,000 a week, exclusive of the Red Owl, 7-11, Gem and Fleming accounts, which also involved private label at discriminatory prices. Continental succeeded in removing from ordinary competition the heart of the Denver market.

There is in short no analogy whatever between the *Borden* case and the Continental case, except that both involved sale of a private label. The existence of private label in both cases establishes no legal excuse for Continental's conduct as described *supra*. The bread industry has many private label programs, none of which led to the destructive price wars caused by the peculiar price mechanism requiring automatic below cost price reductions by Continental under a written agreement, which automatically reduced Continental's price in the event that a competitive offer—at any level—was received.

IV. The jury determined that Tender Crust was not "available" to all customers in the same program.

Finally—Continental asks to be excused from the effects on the market by suggesting that private label was "available" and therefore the Tender Crust program is legal.

The law does not require any instruction to the jury on availability when the conclusive evidence shows that regular customers were not offered the program. Here again the Court used instructions which favored Continental's position. The Court stated: "Now, I have been asked to clarify the fact that if this Tender Crust was offered indiscriminately to everybody, why, there is no violation whatsoever." (R. 2659). In essence the Court stated that the jury should find in favor of Continental, if the program was offered generally. A jury question was created and decided adversely to Continental.

Private label bread was sold at a variety of prices. Continental, for example, had discriminations between its own private label sales (R. 912). In the fall of 1967 the Red Owl label and the Oak Farms label (7-11) were sold at 15¢ and Tender Crust at 13.05¢ (15¢ less the discounts).

Moreover, Continental's obligation is not to discriminate between customers who buy from Continental. If the retailer or grocery store can get a private label someplace else, that may be material to a secondary line case, but it has absolutely no relationship to a primary line case in which Continental's unfair discriminatory pricing took customers away from other bakeries and destroyed their business.

Continental clearly did not make the Tender Crust program which it sold available generally (R. 693):

> "Q. And the question of who you offered it to, the program was designed for AG stores, isn't that right?
> A. That's right.
> Q. And in going around to talk to the AG stores, it is my understanding that you did not solicit for the program the non-AG stores, is that right?
> A. That's right."

Moreover, Continental admitted in its answers to interrogatories that at least 253 charge account customers and an unestimated number of cash customers purchased Wonder label bread at the regular list price (R. 2075). Continental would have the Court—and the jury—believe that these customers "rejected" lower prices and preferred to pay a higher price. There is, of course, no showing whatever that Continental made private label offers to any customer who purchased at the higher prices on the regular Wonder Bread list.

CONCLUSION

The petition for a writ should be denied: This case does not represent a typical "private label" bread contract but

rather involves a predatory pricing system in which discriminations occurred between private labels—as well as the more conventional discrimination between regular and private labels. The pricing of Continental was below cost and destructive. No conflict exists between the decision of the Tenth Circuit in this case and Borden's private label case reviewed by this Court and the Fifth Circuit. The jury was properly instructed and determined with substantial record support that the private label pricing caused the elimination of a competitor, damage to competition and a tendency to monopolize the market.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this date served the attached Brief of Respondent Interstate Brands Corporation in Opposition of Continental Baking Company and on Old Homestead Bread Company by mailing three copies of the same, airmail postage prepaid, to their respective counsel of record, John H. Schafer, 888 16th Street, N.W., Washington, D.C. 20006, E. Edward Bruce, Covington & Burling, 888 16th Street, N.W., Washington, D.C. 20006 and John S. Pfeiffer, 1900 Security Life Building, Denver, Colorado 80202. All parties required to be served have thus been served.

Edward L. Foote

September 18, 1973